Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization To Provide In-Region, InterLATA Services in Virginia	)))))))))))	WC Docket No. 02-214

REPLY COMMENTS OF AT&T CORP.

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Before the
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In the Matter of Application by Verizon Virginia Inc., Verizon Long Distance Virginia Inc., Verizon Enterprise Solutions Virginia Inc., Verizon Global Networks Inc., and Verizon Select Services of Virginia Inc., for Authorization To Provide In-Region, InterLATA Services in Virginia	)	WC Docket No. 02-214

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's Public Notice, AT&T Corp. ("AT&T") respectfully submits these reply comments in opposition to the joint application of Verizon for authorization to provide in-region, interLATA services in Virginia.

INTRODUCTION AND SUMMARY

The initial comments of other parties, the Evaluation of the Department of Justice, and the abortive Recommended Decision of the Virginia SCC's Hearing Examiner all underscore Verizon's failure to satisfy the standards of Section 271. While the appropriate rate for each Verizon service at issue is for the Commission to decide in the arbitration docket, there is no dispute that Verizon's existing rates do not satisfy the Commission's benchmark comparison with New York. On a cost adjusted basis, Verizon's Virginia non-loop rates are *43 percent* higher than their counterparts in New York, the state that the Commission has used as its rate-to-cost benchmark for TELRIC compliance in other Verizon states. For Verizon's switching rates, the disparity is 53 percent. And even Verizon has proposed in the pending arbitration to reduce many of its other existing rates.

The initial comments also make clear that Verizon has not begun to provide nondiscriminatory access to AT&T and other CLECs. Verizon's discriminatory provisioning of high capacity loops (except when CLECs consent to pay Verizon's exorbitant charges for using the same facilities to obtain special access) is violative of Competitive Checklist items 2 and 4, and constitutes a massive barrier to entry. Verizon's failure to offer a reliable mechanism for accurate provisioning of white pages directory listings is another instance of discrimination having major anticompetitive consequences.

The balance of these comments is organized as follows. Parts I and II, supported by the attached declaration of Michael Baranowski, demonstrates that Verizon's non-loop recurring rates in Virginia not only have violated TELRIC since they were first prescribed in 1999, but also violate the Commission's benchmarking test by a wide margin. In Part III, we respond to the comments concerning Verizon's failure to provide reasonable and nondiscriminatory access to UNEs and directory listings. In Part IV, we explain why the Recommended Decision of the Virginia SCC's Hearing Examiner, and the subsequent cover letter by the SCC itself, can be given no deference as consultative reports under Section 271. And in Part V, we discuss the assertions of certain parties that Verizon's monopoly power over residential service in Virginia has been neutralized by competition.

I. VERIZON'S NON-LOOP RATES FAIL THE COMMISSION'S BENCHMARK TEST.

AT&T demonstrated in its initial comments that Verizon's non-loop rates fail the Commission's benchmark comparison with Verizon's New York non-loop rates. On a cost-adjusted basis, Verizon's non-loop rates in Virginia exceed their New York counterparts by 36 percent in the aggregate, and Verizon's switching rates in Virginia exceed those in New York by 45 percent.[1] No participant this proceeding—including the parties that support Verizon's application—has disputed this fact. Nor has any participant disputed that, if Verizon's non-loop rates are higher (on a cost-adjusted basis) than those in a valid benchmark state, Verizon must prove—with specific cost evidence—that its non-loop rates are appropriately cost-based.

II. VERIZON HAS FAILED TO ESTABLISH THAT ITS RECURRING AND NON-RECURRING RATES SATISFY BASIC TELRIC STANDARDS.

AT&T also demonstrated in its initial comments that many of Verizon's UNE prices in Virginia are clearly far above TELRIC-compliant levels. The evidence for this fact includes (1) the massive record in the pending arbitration proceedings involving Verizon's UNEs and UNE prices in Virginia, currently awaiting a decision on pricing issues by this Commission;[2] (2) the substantial decline in the average cost of unbundled

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[1] AT&T Comments (Aug. 21, 2002) at 3-5; *id*., Pitkin Decl. Please note that the benchmarking disparity between Virginia and New York rates calculated in AT&T's initial comments—43 percent and 53 percent for aggregate non-loops UNEs and switching only, respectively—was overstated by the inadvertent omission of Verizon's rates in New York for features and signaling (19 cents and 8 cents respectively). Including these amounts in the analysis reduces the benchmarking differential between Virginia and New York to 36 percent for non-loops and 45% for switching only.

[2] CC Docket No. 00-218, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration*; CC Docket No. 00-251, *Petition of AT&T Communications of Virginia Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia*

loops in Virginia as a result of growth in line counts since 1997, the vintage of most of the cost data underlying Verizon's existing rates; (3) the substantial declines in the discounted price of switching equipment and the enhancement of Verizon's buying power since 1996, when Verizon developed its Phase I switching cost studies; (4) the sheer magnitude of the margins (36 and 45 percent, respectively) by which Verizon's non-loop rates and switching rates fail the Commission's standard benchmarking comparison against Verizon's New York rates; and (5) Verizon's proposal, in the pending arbitration docket before the Commission, to *reduce* many of its existing rates—an implicit admission that those rates are unreasonably high.[3]

None of the other parties' initial comments support a contrary finding. The Department of Justice, while asserting that "Verizon has generally succeeded in opening its local markets to competition," is studiously agnostic about whether Verizon's UNE prices satisfy the just-and-reasonable requirement of Section 271 or the Commission's TELRIC standard.[4]

The July 12 recommended decision of Alexander Skirpan, the administrative law judge designated by the Virginia SCC to preside over the taking of evidence in the SCC's purported consultative proceeding under Section 271, finds that "Verizon Virginia has adequately supported its Virginia rates as being TELRIC-compliant for checklist verification purposes."[5] As explained in Section IV of these Comments, *infra*, Mr.

Corporation Commission Regarding Interconnection Disputes With Verizon Virginia Inc.

[3] AT&T Comments at 5-11; *id*., Pitkin Decl. ¶¶ 27-29; Pitts Decl. ¶ 6-8.

[4] Evaluation of the U.S. Department of Justice (Sept. 5, 2002) ("DOJ Evaluation") at 2-3 & n. 7.

[5] Report of Alexandra F. Skirpan, Jr., Hearing Examiner, Virginia SCC Case No. PUC-2002-00046, *Verizon Virginia Inc.—To Verify Compliance With the Conditions Set Forth in 47 U.S.C. §271(c)* (July 12, 2002) ("Skirpan Report") at 91-92.

Skirpan's recommended decision is not a legally authorized decision of the Virginia SCC, is not entitled to the deference accorded to state commission findings under the consultative provision of Section 271, and warrants no more weight than the opinions of any private citizen.

Even if the recommended decision had the standing of an official act of the Virginia SCC, Mr. Skirpan's findings would be insufficient to support a finding of TELRIC compliance here. His conclusion that Verizon's rates are TELRIC compliant rested in large part on his misimpression that they pass a benchmark comparison with Verizon's New York rates.[6] As noted above, however, Verizon's switching rates fail a benchmark comparison by a wide margin.

Mr. Skirpan's reliance on the April 15, 1999 final decision of the SCC in Case No. PUC-1997-00005, the first generation UNE rate case involving Verizon in Virginia, is equally misplaced. Mr. Skirpan states, without explanation or analysis, that the rates set by the SCC in that proceeding were "TELRIC-compliant rates."[7] As explained above, however, subsequent declines in costs since 1996-97, when the cost record in that case was compiled, have rendered the 1999 rates badly obsolete. Moreover, it is clear that the SCC-prescribed UNE prices were far above TELRIC-compliant levels from the outset.

The rates for unbundled switching set by the Virginia SCC in 1999 were and are inflated by several clear violations of TELRIC. The resulting cost overrecovery is massive: Verizon's recurring rates for switch utilization, if applied to projected utilization over the projected lives of Verizon's switching equipment in Virginia, would

[6] *Id*. at 91.

[7] *Id*. at 79.

allow Verizon to recover more than *twice* the amount of its *embedded* investment in switching equipment. Baranowski Reply Decl. ¶¶ 3-5.

A variety of TELRIC violations share responsibility for this exorbitant result, including a misallocation of start-up costs to usage; the assumption of outmoded and costly technology resulting from the use outdated modeling assumptions; and the assumption of an inappropriate mix of replacement and growth discounts for switching equipment purchases. *Id*. ¶¶ 6-13. The last of these errors is perhaps the most important.

Switch manufacturers typically provide a larger discount for purchasing a new switch and a lower discount for purchasing add-on growth equipment to an existing switch. The Virginia SCC, in setting Verizon's switch prices in the 1997-99 UNE rate case, initially assumed a discount mix of 85 percent new purchases and 15 percent growth purchases, a mix that was a reasonable approximation of the expected weighted average mix of switching investment that an efficient new entrant could expect to incur over the life of the equipment on a forward-looking basis in 1997. After Verizon objected, however, the SCC arbitrarily changed the discount mix to 54 percent new/46 percent growth.[8] The SCC offered no explanation for its reversal of course other than the cryptic observation that switching prices "can be improved" by revising the switching prices to reflect the 54/46 mix.[9]

The change in discount mix assumptions had a massive effect on Verizon's switching UNE prices. The SCC's switch to the 54/46 mix from the 85/15 TELRIC-

[8] Case No. PUC970005, Order issued Nov. 19, 1998, at 2; Baranowski Reply Decl. ¶ 13.

[9] *Id*.

based mix initially prescribed by the SCC single-handedly inflates switching costs by *59 percent*.[10]

AT&T recognizes that prior 271 decisions have given state commissions more leeway in the choice of a switch discount mix than the Commission might apply if it were setting UNE prices *de novo*. The Virginia SCC's unexplained adoption of the 54/46 mix, however, is a patent TELRIC violation that cannot be justified under any reasonable standard of deference.

TELRIC is a measure of costs over the long-run, in which all investments are avoidable. The "long run is a period so long that all of the firm's present contracts will have run out, its present plant and equipment will have been worn out or rendered obsolete and will therefore need replacement."[11] In the long run, all switches will need to be replaced. Hence, as the court explained in *McMahon*, the long-run perspective means that Verizon would replace all of its switches and use the replacement discount in determining switch costs:

> In the long run (a period of time that varies according to the technology at issue), an efficient and rational competitor would replace all of its existing switches with the most current technology and receive the bulk-rate discounts. Viewed in this light, Bell's proposed switch costs, which it premised upon the small add-on discounts for which it will qualify 'in the coming years," looks only to the short-run.

Bell Atlantic-Delaware, Inc. v. McMahon, 80 F.Supp. 2d 218, 238-239 (D. Del. 2000).

It is irrelevant from a TELRIC perspective that a BOC like Verizon, with a large legacy investment in existing switches, may have little intention of buying new

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[10] Baranowski Reply Decl. ¶ 13.

[11] *Local Competition Order* ¶ 677 n.1682 (quoting William Baumol, *Economic Theory and Operations Analysis* (4th ed. 1977)) at 290).

equipment in the foreseeable short run. The touchstone of forward-looking pricing is not what Verizon has or has not done in its existing network, but what an efficient provider would do *if unconstrained by previous investments and decisions*. Thus, "the current state of Bell's network is irrelevant for purpose of a long-run cost analysis." *Bell Atlantic-Delaware*, 80 F.Supp.2d at 238.

.In other venues, Verizon has conceded that the TELRIC requires the assumed purchase of all new switches, at new switch discounts, as at least the starting point for modeling switching costs. As stated in the *McMahon* case, even Verizon economic witness William Taylor has acknowledged that the "long-run" requirement of the TELRIC standard "says rip every switch out. All of them. . . . Every switch in the network, rip them out. Leave the . . . wire center locations where they are. And build the network that you would build today to serve the demand."[12] And what kind of switches should be installed in the rebuilt network? "Brand new. Big discount." "Cheap." 1997 Md. UNE Tr. at 1299 (Taylor).

To be sure, over the lifetime of the equipment, a firm may be expected to buy some additional capacity at add-on discounts to meet future increases in demand. But the present value of the cost of the growth capacity is likely to be a small fraction of the total present value of the investment over the expected lives of the switching equipment.[13] The Commission will search the SCC's decisions in vain for any reasoned explanation of how a present value analysis could yield at a new/add-on discount weighting comparable to the 54/46 mix inexplicably adopted by the SCC in 1999.

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[12] *McMahon*, 80 F.Supp.2d at 238 (quoting testimony of Dr. Taylor).

[13] Baranowski Reply Decl. ¶ 13.

III. VERIZON DOES NOT PROVIDE REASONABLE AND NONDISCRIMINATORY ACCESS TO UNBUNDLED NETWORK ELEMENTS AND DIRECTORY LISTINGS.

The initial comments of other participants also underscore Verizon's noncompliance with the competitive checklist. Verizon's failure to provide nondiscriminatory access to unbundled high capacity loops or to provide white pages directory listings on nondiscriminatory terms are material violations of Section 271.

A. Verizon Does Not Provide Nondiscriminatory Access To Unbundled High Capacity Loops.

The comments of other parties confirm the enormity of Verizon's discrimination against CLECs in provisioning "high capacity" loops (including DS1 and DS3 loops).[14] These comments establish that:

- Since May 2001, Verizon has enforced a discriminatory and anticompetitive "no facilities" policy, whereby Verizon refuses to provide unbundled access to such loops when it would require "additional construction."[15]
- The "additional construction" that triggers Verizon's "no facilities" policy includes such routine or minor tasks as installing a repeater shelf in the central office, customer location, or remote terminal; providing an apparatus/doubler case; placing fiber or a multiplexer; adjusting the multiplexer to increase its capacity; placing riser cable or a buried drop wire; or placing fiber or copper cable to replace defective copper cable or provide spare capacity.[16]

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[14] *Compare* AT&T comments at 13-16; Allegiance comments at 3-13; *id*., Best Aff. ¶¶ 2-12; Cavalier comments at 7-10; Covad comments at 23-27; NTELOS comments at 4-5; StarPower comments at 4-13.

[15] *See* Allegiance comments at 3; *id*., Best Aff.; Cavalier comments at 7-8.

[16] *See* Allegiance comments at 4-6; *id*., Best Aff. ¶¶ 3, 5 Covad comments at 23-24.

- Indeed, Verizon admitted during the hearings below that it will deny a CLEC's UNE DS-1 order for "no facilities" even when all that Verizon Virginia must do to provide the requested service is open a cable sheath to splice existing pairs into an existing apparatus case.[17]
- Invoking its "no facilities" policy, Verizon rejects up to 39 percent of CLEC orders for high capacity loops in Virginia—a rejection rate that dwarfs the corresponding rejection rates of other BOCs, which are typically in range of three percent.[18]
- In contrast, Verizon aggressively solicits and fills DS1 orders received from its retail end users under the same circumstances. In the 271 hearing before the Virginia SCC, Verizon acknowledged that it "will build for the retail side," but not for CLECs.[19]
- Verizon has refused repeated requests from CLECs to change this policy, even when a CLEC is willing to pay the cost of the repeater shelf or the apparatus/doubler case.[20]
- Verizon's "no facilities" policy—or, more precisely, "no facilities for UNEs" policy—is a major barrier to competition in Virginia. When Verizon refuses to provision an unbundled DS1 loop on the pretext that "no facilities" are available, the only alternative open to the CLEC (other than abandoning the potential retail customer to Verizon) is to obtain a special access circuit from

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[17] Virginia SCC 271 Tr. 98, 676, 690; Covad Comments at 24.

[18] *See* Allegiance comments at 4; *id*., Best Aff. ¶¶ 4, 10; Covad comments at 24.

[19] Virginia SCC Case No. PUC-2002-00046, Hearing Tr. 681; *see also* Allegiance comments at 6; *id*., Best Aff. ¶ 6; Covad comments at 25.

[20] Allegiance comments at 7.

> Verizon. Recurring special access charges are approximately five times the recurring cost of a DS1 loop plus cross-connect. Moreover, Verizon's requirement that the CLEC cancel the UNE order and resubmit a special access order increases the installation interval, and thereby delays the initiation of service to the CLEC's customer, by approximately 30 additional days.[21] Cancellation of the retail customer's order, followed by loss of the customer to Verizon, is likely to ensue.[22]

Under these circumstances, Verizon's "no facilities" policy is a facial violation of the antidiscrimination provisions of the Act. One of the bedrock principles of the Act is that ILECs may not discriminate against its competitors in allocating scarce capacity between the competitors and the ILECs' own retail customers. This principle is reflected, *inter alia*, in Section 251 (which requires Verizon to provide interconnection and access to unbundled network elements on "rates, terms and conditions that are just, reasonable, and nondiscriminatory"), Checklist Item 4 (which requires Verizon to provide unbundled loops), and Checklist Item 2 (which requires Verizon to provision loops and other UNEs on nondiscriminatory terms). 47 U.S.C. §§ 251(c)(2)(D), (3); *id.*, §§ 271(c)(2)(B)(ii), (iv).

Verizon's "no facilities" policy is also inconsistent with the Commission's accounting rules. The implicit premise of the policy is that Verizon ought not to be required to provide additional capacity when doing so would require Verizon to incur major additional capital expenditures. As the Commission's accounting rules recognize,

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[21] *See* Allegiance comments at 7-8; *id.*, Best Aff. ¶¶ 7-10; Cavalier comments at 8-9; StarPower comments at 5.

[22] NTELOS comments at 4.

however, the kinds of plant replacement and rearrangement at issue are ordinary expenses, not capital projects: "Plant Specific Operations Expense accounts shall include the cost of . . . replacing items of plant other than retirement units; rearranging and changing the location of plant not retired . . ." 47 C.F.R. § 32.5999(b)(3). If Verizon were to capitalize the cost of rearranging existing facilities, such as opening a cable sheath to splice existing cable pairs into an existing apparatus case, Verizon's accounts would be materially misleading under the securities laws.

Verizon's policy is also inconsistent with TELRIC. The loop rates set by the Virginia SCC, like the rates set by most state commissions under the 1996 Act, include a substantial markup to cover the costs of spare capacity acquired in anticipation of future growth in demand. Fill factors, the generally accepted measure of this spare capacity, reflect the assumption that Verizon will expand its network to accommodate forecasted demand in Virginia.[23] Stated otherwise, fill factors "reflect that a certain level of spare plant will continuously remain available to meet demand, and the costs associated with this plant are included in the TELRIC-based prices."[24] If Verizon is truly does not maintain the spare capacity needed to fulfill most requests for an additional loop, the TELRIC of a loop, and the TELRIC-compliant rate for a loop, are far less than the Virginia SCC assumed when setting Verizon's UNE prices.[25]

The findings of Mr. Skirpan in his report to the SCC do not support a contrary finding by the Commission. As noted above, because his report is not an authorized decision of the SCC under Virginia law, the Commission may not give it any deference

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[23] Skirpan Report at 117.

[24] Skirpan Report at 117

[25] Virginia SCC Case No. 970005, Order dated April 15, 1999, at 12-15.

as such. In any event, his conclusion that Verizon's "no facilities" rule complied with Checklist Items 2 and 4 was not based on any factual findings, but on an assumption of law: that the Commission had approved the "no facilities" rule in the *New Jersey* and *Pennsylvania 271 Orders*. *See* Skirpan Report at 115; *New Jersey 271 Order* ¶ 151; *Pennsylvania 271 Order* ¶ 92. Whatever the original basis for this assumption, it clearly does not survive the Commission's holding in its July 17 non-cost arbitration decision that Verizon cannot refuse to provision a DS1 loop on the ground that "multiplexing equipment is absent from the facility":

> Verizon cannot refuse to provision a particular loop by claiming that multiplexing equipment is absent from the facility. In that case, Verizon must provide the multiplexing equipment, because the requesting carrier is entitled to a fully-functioning loop. So too is it for dedicated transport.[26]

On the facts, Mr. Skirpan *agreed* with the CLECs that Verizon's discriminatory provisioning of high capacity loops raises serious competitive concerns as a barrier to entry. *See* AT&T Comments at 14-15.

B. Verizon Does Not Provide Nondiscriminatory Access To Directory Listings.

The comments of other participants also confirm that Verizon fails to provide mechanisms for ensuring accurate transmittal and printing of telephone directory entries for CLECs. The enormous disparity between the rate of errors for directory listings of CLEC-served customers, and directory listings of Verizon's own retail customers, constitutes nondiscriminatory access to white pages directory listings in violation of

[26] *Virginia Arbitration Non-Cost Order* ¶ 499 n. 1658 (last three sentences).

checklist item eight (47 U.S.C. § 271(c)(2)(viii)). *See* AT&T Comments at 16-17; Cavalier comments at 21-26; *see also* AT&T *ex parte* handout filed Sept. 12, 2002.

The DOJ Evaluation contains similar findings. "RBOC-caused inaccuracies in directory listings can result in substantial competitive harm." DOJ Evaluation at 7. The reason is obvious: "irregularities involving the white pages are a very serious matter because customers may tend to blame the new competitor, rather than the familiar incumbent, for mistakes." *Id*. (citing *Texas 271 Order* ¶ 358). Moreover, the "significance of inaccurate directory listings is heightened" because "errors and omissions in the directory normally cannot be corrected for an entire year." *Id*. at 8. And trying to reduce errors by hiring additional employees to undertake an incoming review of directory listings is extremely costly. *Id*.

Rather than resolve the issue, however, the DOJ essentially punted it to the Commission: "the Commission may receive additional information during its consideration of Verizon's application, and therefore be able to assess more completely the effectiveness of Verizon's recent [process] improvements." *Id. at 9.* AT&T respectfully submits that the Commission now has ample information to finish the assessment.

The optimism of the Skirpan Report that recent or promised changes in Verizon's processes will actually result in improved accuracy of listings is unsupported by the record. A Verizon ex parte filing on the issue only two days ago is telling. In the ex parte, Verizon responds to a question from Staff by defending the processes designed to achieve accurate listings in Verizon's directory assistance *database*.[27] The relevant issue,

[27] Ex parte letter from Ann D. Berkowitz (Verizon) to Marlene Dortch (FCC) dated Sept. 10, 2002.

however, is not whether the database is correct, but whether the *printed hard copy directory* that retail customers actually use is correct. For this question, neither Verizon nor its consultant KPMG has developed a useable metric.

In this regard, the notion that the Commission cannot make a finding of 271 noncompliance unless AT&T or other CLECs offer reliable measurement data on the extent of the disparity between error rates has the burden of proof backwards. Verizon and other BOCs have the burden of proving in 271 cases that the differential rate of errors in CLEC vs. ILEC directory errors is small, not *vice versa. See Second BellSouth Louisiana Order* ¶ 255; *Verizon New Jersey Order*, App. C ¶ 60. Verizon cannot place the issue beyond scrutiny by failing to maintain an adequate metric of error rates: given the importance of this information, Verizon's failure to do so is an unreasonable practice.

Finally, Verizon's latest purported solution to the directory assistance listing problem—requiring CLECs to hire additional employees to review Verizon's LVRs for error—merely changes the form of the discrimination. Verizon does not (and need not) engage in this kind of costly after-the-fact review of the directory listings for its own retail customers. Hence, requiring CLECs to incur this additional cost because Verizon is unwilling to adopt the before-the-fact quality control mechanisms needed to give CLEC directory listings the same level of accuracy as Verizon's own listings constitutes undue discrimination.

IV. THE JULY 12 REPORT OF THE SCC HEARING EXAMINER IS NOT A VALID ORDER OF SCC, AND ITS FINDINGS ARE NOT ENTITLED TO THE DEFERENCE OR WEIGHT GIVEN TO STATE CONSULTATIVE DECISIONS.

In recent 271 cases, the Commission has given considerable deference to the findings of state commissions in their consultative proceedings. The Commission's deference to state commission findings is particularly great when the findings involve predictions about competition and the public interest.[28]

No such deference can be given here, however. For the first time in the Commission's review of section 271 applications, the state commission did not file a consultative report on or before the date set by the Commission for submitting such reports (August 21).[29] Moreover, neither the July 12 report of the SCC's hearing examiner nor the SCC's August 1 letter to the FCC qualify as lawful pronouncements of the SCC under Virginia law,[30] and so any findings and conclusions contained in those documents cannot be given any weight by the FCC. Because of this deficiency in the record, the Commission must base its competition and other findings on a direct, *de novo* analysis of the record, with no deference accorded to the recommended consultative report issued by the hearing examiner.

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[28] For example, the FCC has stated that "We do not conduct a *de novo* review of a state's pricing determinations" (*NJ 271 Order* at ¶ 17); "we recognize the work of the New Jersey Board of Public Utilities (New Jersey Board) in laying the foundation for approval of this application. (*id*. at ¶ 2); "The New Jersey Board conducted an extensive proceeding . . . to facilitate competition in local exchange markets (*Id* at ¶ 5); ". . . [W]e find no TELRIC errors in the New Jersey Board's analysis of Verizon's fill factors. (*id* at ¶ 31); "We are satisfied that the New Jersey Board carefully evaluated this [switch discounts] issue. . . " (*id*. at ¶ 44); "[W]e accord substantial weight to the New Jersey Board's factual findings on this issue [regarding completion notifiers]." (*id*. at ¶ 105); "Our analysis of order completion notices relies heavily on the performance measures the New Jersey Board developed . . ." (*id* at ¶ 111); "[W]e nevertheless defer to the performance measurement standards set by the New Jersey Board . . . " (*id*. at ¶ 113); "We note that the New Jersey Board found that Verizon complies with its obligations to provide reciprocal compensation. (*id*. at ¶ 159).

[29] WC Docket No. 02-214, Public Notice released August 1, 2002, at 3.

[30] Letter to Marlene H. Dortch, Secretary, Federal Communications Commission dated August 1, 2002, re: *In the Matter of Verizon Virginia, Inc., to verify compliance with the conditions set forth in 47 U.S.C. § 271(c)* ("SCC letter").

A. The July 12 Skirpan Report and the SCC's August 1 Cover Letter To the Commission Are Not Lawful Orders Of the SCC, And Contain No Findings That Can Be Given Deference By The Commission.

The SCC, as an administrative agency of the Commonwealth of Virginia, speaks only through its orders. *Dale H. Kennedy v. Aceves Construction & Maintenance Company et al.*, 1995 Va. App. Lexis 16, citing *Frank L. Cook Transfer v. Commonwealth*, 196 Va. 384, 390, 83 S.E.2d 735, 736 (1954) as applying this rule to the State Corporation Commission.

The SCC's August 1 letter is not an order. It provides no findings of fact or conclusions of law. It contains no ordering provisions. Nowhere does it state that the three Virginia Commissioners have adopted, as their own, the hearing examiner's findings and recommendation. Indeed, nowhere does the letter state what, if anything, the three Commissioners are recommending to the FCC. Rather, the letter asks only that the FCC "consider" the July 12 Skirpan Report.

The Skirpan Report is also not an order. Under Virginia law, recommendations from a hearing examiner cannot stand as findings or conclusions of the SCC unless and until it adopts the examiner's recommendation as its own. The SCC is comprised of three individuals elected by the Virginia legislature (Va. Const. Art. IX., § 1), and they are the only persons given authority by the Virginia Constitution and statutes over public utilities doing business in the Commonwealth. Va. Const. Art. IX, § 2; Code § 12.1-12. That authority cannot be delegated to employees or subordinates of the SCC, nor can such subordinates speak on behalf of the SCC in matters relating to public utilities. Just as the SCC is not bound by the findings or opinions of its Staff with respect to public utility matters, *Roanoke Gas v. Atty. General*, 219 Va. 1072, 1079, 254 S.E. 2d. 102, 106 (1979), it is also not bound by the findings and recommendations of its hearing examiners. Those findings and recommendations are advisory only. Va. Code § 12.1-31.

So while the Virginia State Corporation Commission may appoint hearing examiners to assist it in discharging its constitutional and statutory duties, it cannot delegate final decision-making authority to such an individual, absent clear statutory authority to do so.[31]

Moreover, a hearing examiner's report cannot be adopted as an order of the SCC unless and until parties are given an opportunity to challenge the examiner's finding and conclusions. "The parties [receiving an examiner's report] shall be allowed a reasonable time to respond and such responses shall become a part of the record and be considered by the Commission in making a decision." Code of Virginia § 12.1-31. In this instance, however, the Virginia Commission's March 20, 2002 order appointing the examiner expressly noted that ". . . the Commission will not require comments and exceptions to the Hearing Examiner's report but will make its recommendation to the FCC based upon the record to be developed by the Hearing Examiner." Order at 4. Beyond one round of post-hearing briefs, "[n]o further post-hearing pleadings will be considered." *Id*. at 9.

The background of the state 271 proceeding makes clear that the SCC's failure to issue an order of its own, or formally adopting the Skirpan Report as an order of the SCC, was no accident. From the very outset, the Virginia Commission made clear that it did not intend to issue any order addressing Verizon's compliance with the checklist. In

[31] Except as expressly provided for by Virginia law, the SCC does not have the authority to delegate other of its powers and duties in that it is a creation of Virginia law and has no inherent powers. *City of Richmond v. C. & P. Tel. Co.* 127 Va. 612, 105 S.E.2d 127 (1920). While the legislature has authorized the Commission to delegate some of its duties with respect to insurance and banking matters to its Commissioners of Financial Institutions and Insurance; Va. Code § 12.1-16, it has not been authorized any similar delegation with respect to employees or agents addressing public utility matters.

particular, the SCC's March 20, 2002, order appointing its hearing examiner to review Verizon's application specifically stated that "there will be no formal order issued [by the Commission], nor will the Commission make any final finding, decision settling the substantive law, order, or judgment within the meaning of § 12.1-39 of the Code of Virginia." Order at 3.

The reason for the SCC's reticence is no mystery: in recent years the SCC has consistently avoided taking any action that might subject the SCC to judicial review by a federal court. In four separate orders in 2000, for example, the SCC declined to arbitrate Verizon's interconnection disputes with Verizon and other CLECs unless all the parties agreed that the arbitration would occur solely under state law. In each instance, the SCC stated that it was unwilling to waive sovereign immunity and submit to the jurisdiction of federal courts pursuant to Section 252(e)(6) of the Act; indeed, the SCC regarded such a waiver as forbidden by Virginia law. The SCC therefore stated that, in order to avoid any claim of such waiver, it would arbitrate interconnection disputes under state law only, and that parties that wished to invoke federal law would be required to bring their arbitrations to the FCC instead.[32] As the SCC explained in the case involving AT&T,

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[32] See Order, *Petition of Cavalier Telephone, LLC, for Arbitration and Interconnection Rates, Terms, and Conditions, and Related Relief*, Case No. PUC990191 (June 15, 2000); Final Order, *Petition of Focal Communications Corporation of Virginia for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon Virginia Inc. f/k/a/ Bell Atlantic – Virginia, Inc.*, Case No. PUC000079 (August 22, 2000); Order, *Petition of MCIMetro Access Transmission Services of Virginia, Inc. and MCI WorldCom Communications of Virginia, Inc. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Bell Atlantic – Virginia, Inc.*, Case No. PUC000225 (September 13, 2000); Order of Dismissal, *Petition of Cox Virginia Telcom, Inc., Requesting Party, v. Verizon Virginia Inc. f/k/a/ Bell Atlantic-Virginia Inc., Responding Party, for Declaratory Judgment and Conditional Petition for Arbitration of Unresolved Issues by the State Corporation Commission Pursuant to Section 252 of the Telecommunications Act of 1996 or Alternative Petition for Dismissal*, Case No. PUC000212 (November 1, 2000).

"we will not act solely under the Act's federally conveyed authority in matters that might arguably implicate a waiver of the Commonwealth's immunity."[33]

B. The SCC's Failure To Issue A Valid Consultative Decision Requires The Commission To Base Its Policy Findings On A *De Novo* Review Of The Record Below.

The SCC's refusal to take a more forthcoming role in the 271 review process is a decision purely within the SCC's discretion. Nothing in the 1996 Act or Virginia law requires the SCC to file a consultative report, to "consult" with the FCC, or to adhere to any other requirement of the Act. Hence, there was no basis for appealing to the Virginia courts from either the SCC's March 20, 2002, preliminary order appointing the hearing examiner nor its August 1 letter to the FCC. Nor is there any basis for seeking review at this Commission.

The absence of a final and reviewable SCC "order . . . final finding, decision settling the substantive law, order, or judgment" under Virginia law has major consequences for the Commission's own decisionmaking process, however. The Commission cannot (and may not) give its usual deference to an "order" of the SCC if the SCC has decreed that its pronouncements do not constitute an order, finding, decision or judgment at all. Where, as here, a state commission offers the FCC no findings or conclusions, the FCC must review the record de novo.[34]

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[33] Virginia State Corporation Commission, Case No. PUC000261, *Petition of AT&T Communications of Virginia, Inc., TCG Virginia, Inc, and National Telecom Corp. For Declaratory Judgment*, November 22, 2000.

[34] This is equally true of the findings in the Recommended Decision that support AT&T's position. To avoid any ambiguity on this point, AT&T expressly states that the portions of the decision cited in AT&T's comments are offered to the Commission only as roadmaps to the underlying record before the SCC.

This objection is not merely technical, but involves fundamental issues of due process and accountability. The Virginia legislature, like the U.S. Congress and most state legislatures, has conditioned the right to seek judicial review of an agency finding on the issuance of on official order or decision by the agency through its duly constituted (and therefore legally accountable) members. Treating the SCC's non-order as an order, and its non-findings as findings entitled to Commission deference, would create an administrative Catch-22: the opinions of the SCC hearing examiner would operate to the detriment of AT&T and other parties, yet the aggrieved parties would have no recourse for obtaining review of those opinions from any tribunal because they were never incorporated in a reviewable SCC order.

C. The Recommendations Of The Skirpan Report Rely On Subsidiary Findings That Were Beyond The SCC's Jurisdiction To Make, Or Were Overturned By The Commission In Its August 17 *Arbitration Non Cost Order.*

The factors that argue against giving weight to the SCC decision or recommended decision go beyond due process. Many of the issues explicitly or implicitly resolved by the Recommended Decision were clearly beyond the jurisdiction of the SCC to evaluate. These included:

(1) **Checklist item 1**: Interconnection issues, such as Verizon VA's so-called Geographically Relevant Interconnection Point ("GRIPs") position by which Verizon VA intends to shift its costs of interconnection to the CLECs, and corollary issues associated with that;

(2) **Checklist item 2**: UNE issues, including vitally important issues regarding the pricing of UNEs and the terms and conditions of Verizon VA's obligations to provide certain UNEs and UNE combinations;

(3) **Checklist item 4**: Unbundled local loops, including conversions of special access to UNEs and the availability of dark fiber;

(4) **Checklist item 5**: Unbundled local transport, including appropriate rates;

(5) **Checklist item 6**: Unbundled local switching, including the interpretation of the 4 or more line exemption specified in the FCC's *UNE Remand Order*;

(6) **Checklist item 11**: Number portability, including issues related to the terms and conditions of number porting, such as hours of operation and intervals;

(7) **Checklist item 13**: Reciprocal compensation, including reciprocal compensation rates, and the terms and conditions for ISP traffic as mandated by the FCC's *ISP Remand Order*; and

(8) **Checklist item 14**: Resale, including resale prices and the resale of vertical features.

Given the severe limitations on the SCC's authority in the wake of its decision not to serve as the forum for UNE litigation, the Skirpan Report understandably chose to duck many significant issues by deferring them to FCC. *See* Skirpan Report at 1 (2nd paragraph); *id*. at 26-27 (re GRIPS); *id*. at 169 (effect of pricing on long-term viability of competitive entry); competitive issues generally (8/1/02 SCC decision at 1-2).

On other issues, Mr. Skirpan based his section 271 analysis on Verizon positions that the Commission rejected or supplanted barely a month later in its *Virginia Arbitration Non-Price Order*. For example:

- ***GRIPS***: Mr. Skirpan found that, under prior Commission precedent, Verizon's GRIPs policy "does not violate" the Commission's "rules related to interconnection and transport." Skirpan Report at 25-26. A month later, the Commission held that Verizon cannot require CLECs to bear its costs of delivering its originating traffic to a point of interconnection. *Virginia Arbitration Non Price Order* ¶ 53.
- ***Provision of multiplexing equipment on loops***: Mr. Skirpan, while expressing concern about the anticompetitive effects of Verizon's "no facilities" policy, found that it was "compliant with FCC rules." Skirpan Report at 97-117. A month later, however, the Commission held that Verizon cannot refuse to provision a particular loop on the ground that the necessary facilities lack multiplexing equipment. *Virginia Arbitration Non Price Order* ¶ 499 n. 1658.
- ***Dark fiber***: Mr. Skirpan concluded that Verizon's existing "processes and procedures for unbundling dark fiber are compliant with the Act." Skirpan Report at 119-24. The Commission held, however, that Verizon must provide access to dark fiber not only at Verizon's central offices, but also "at or near the customer's premise; at the main distribution frame; and anywhere that feeder and distribution plant meet." *Virginia Arbitration Non Price Order* ¶ 452. Dark fiber includes facilities that have regenerators or amplifiers along the route. *Id*. ¶ 454. Verizon must also provide dark fiber on routes that pass

through intermediate central offices, *id.* ¶ 457, and must allow CLECs to reserve dark fiber, *id.*, ¶¶ 460-61.

- ***Direct end office trunking***: The Commission held in its August decision that Verizon cannot force CLECs to establish direct end office trunking when traffic to a particular Verizon exceeds a DS-1 level. *Virginia Arbitration Non Price Order* ¶ 88; *cf.* Skirpan Report at 157-58.

For all of these reasons, it would be utterly illogical and unfair for the FCC to give any deference to the opinions offered in the Skirpan Report. Those findings are entitled to no more weight than the opinions of any private citizen with no authority to speak on behalf of the elected or appointed branches of government. If the Commission wishes to make use of the record in the Virginia 271 proceeding, the Commission must evaluate the underlying record *de novo*.

V. VERIZON'S ENTRY INTO THE INTERLATA MARKET WOULD HARM THE PUBLIC INTEREST.

De novo review of the underlying record before the SCC, as well as the initial comments of other parties in the present proceeding, confirms that approval of Verizon's 271 application would be contrary to the public interest. InterLATA Authorization is not in the public interest unless Verizon's local markets are irreversibly open to competition. Verizon maintains monopoly power over residential service in Virginia. The lack of meaningful UNE- and facilities-based competition in Verizon's local residential markets is due to entry barriers and Verizon's anticompetitive conduct. And Verizon's premature and unlawful marketing of long distance services is a further ground for denial of this section 271 application.[35]

[35] AT&T Comments at 17-30; *accord*, Cavalier comments at 30-31; Sprint comments; StarPower

While the DOJ offers its usual 271 finding that "Verizon has generally succeeded in opening its local markets in Virginia," the DOJ fails to explain how one could make such a finding without knowing (1) whether Verizon's UNE prices are (or will be) TELRIC-compliant; (2) how Verizon's "no construction" policy for high capacity loops should be resolved; or (3) "whether Verizon is providing sufficiently accurate and reliable white pages directory listings"—three critical issues on which the DOJ expressly takes no position.[36]

The "findings" of the Skirpan Report are no better supported. Mr. Skirpan adopts Verizon's testimony that CLECs now have collocation access to 87 percent of Verizon's lines in Virginia,[37] but offers no analysis of how many (if any) of those companies are likely to survive, let alone expand.[38] He dismisses as irrelevant the near-complete absence of competition in the more rural areas of Virginia.[39] And, consistent with the SCC's unwillingness to make any findings sufficiently definite to permit judicial review, he acknowledges that the SCC's refusal to waive sovereign immunity means that the "FCC must take a more active role in arbitrating interconnection disputes and deciding other matters that normally fall to state commissions."[40]

The remaining comments on competition and public interest issues are short boilerplate statements of the kind that dominant carriers often solicit from trade associations and other interest groups that are only peripherally involved in the industry

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comments.

[36] DOJ Evaluation at 2-4.

[37] ALJ Recommended Decision at 167-68.

[38] *Id*. at 168-69.

[39] *Id*. at 169.

[40] *Id*.

regulatory process.[41] None of these statements address the competitive issues discussed above.

CONCLUSION

For the foregoing reasons, and those stated in AT&T's August 21 initial comments, Verizon's application for authorization to provide in-region, interLATA services in Virginia should be denied.

Respectfully submitted,

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September 12, 2002

[41] *See* Comments of Alliance for Public Technology, American Association of People with Disabilities, American Legislative Exchange Council, Community Action Partnership, National Association of Development Organizations, Partners in Education, National Black Chamber of Commerce, National Grange, Organizations Concerned about Rural Education.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing Reply Comments of AT&T Corp. was served, by the noted methods, the 12th day of September, 2002, on the following:

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